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No. _____

In The

Supreme Court of the United States

THOMASINE ROSS, et al.,

Petitioners,

v.

FEDERAL HIGHWAY ADMINISTRATION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a Court of Appeals must disregard its own findings of arbitrary, capricious and unjustified government action and wholly defer to a district court's finding of substantial justification of the government's position in denying EAJA fees to a prevailing party?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The full names of the petitioners in this case are:

Thomasine Ross; Stanley Ross; Anjanette Bitsie; Pemina Yellowbird; Jason Daniels; Wetlands Preservation Organization; and Kansas University Environs, Kansas Unincorporated Associations,

The full names of the respondents in this case are:

Federal Highway Administration; David Geiger, in his Official Capacity as Division Administrator, Federal Highway Administration; Mark Buhler, Tom Taul, and Dean Nieder, in their Official Capacities as County Commissioners of Douglas County, Kansas; and E. Dean Carlson, in His Official Capacity as Kansas Secretary of Transportation.

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PETITION FOR WRIT OF CERTIORARI

Thomasine Ross and other petitioners respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported in table form at 242 F.3d 390 (10th Cir. 2001), at 2001 WL 23148 (10th Cir.) and is included in the Appendix at 1. The order denying the petition for rehearing is included in the Appendix at 68. The opinion of the district court is reported only at 1999 WL 381460 (D.Kan.) and is included in the Appendix at 10. The district court order denying a motion to alter or amend is included in the Appendix at 19. The underlying opinions on the merits are found at 972 F.Supp. 552 (D.Kan 1997) and 162 F.3d 1046 (10th Cir. 1998) and are included in the Appendix at 22 and 49, respectively.

JURISDICTION

The court of appeals entered its judgment on January 10, 2001, and denied the petition for rehearing on March 21, 2001. The jurisdiction of this Court is invoked under 28 USC § 1254(1).

STATUTORY PROVISION INVOLVED

The Equal Access to Justice Act (EAJA), 28 USC § 2412(d)(1)(A) provides that:

> . . . a court shall award to a prevailing party . . . fees and other expenses . . . incurred by that party in any civil action . . . brought by or against the United States . . . unless the court finds that the position of the United States was substantially justified. . . .

STATEMENT OF THE CASE

Petitioners in this case are Native Americans and environmentalists who use a wetlands near a proposed highway in Kansas for spiritual, recreational, educational and environmental purposes. They successfully argued to the district court that NEPA applied to the road project, that it was arbitrary and capricious for the US Federal Highway Administration to discontinue a partially-completed Supplemental Environmental Impact Statement (SEIS) and abandon its NEPA responsibilities some ten years after that process was begun and that the environmental studies needed to be completed before a route for the highway was selected. Jurisdiction was invoked under 28 USC § 1331 (federal question). The court granted preliminary and permanent injunctions halting any further road-building activities until NEPA was complied with. The district court found the agencies' action of not completing the SEIS arbitrary and capricious under the Administrative Procedure Act. 972 F.Supp. 552 (D.Kan. 1997).

The respondent agencies appealed that decision. The Tenth Circuit Court of Appeals unanimously affirmed, finding that "it was simply too late for the state of Kansas to convert the eastern segment into a local project." 162 F.3d at 1052-53. That court also looked closely at the state of the law in 1997 and especially an earlier Tenth Circuit case, *Village of Los Ranchos de Albuquerque v. Barnhart*, 906 F.2d 1477 (10th Cir. 1990), on which the federal respondents had fully based their position in litigation. The Court of Appeals stated that "nothing in *Los Ranchos* supports the government's decision to 'defederalize' the eastern segment of the South Lawrence Trafficway." 162 F.3d 1053.

Petitioners then sought attorneys fees and costs pursuant to the Equal Access to Justice Act (EAJA) (28 USC § 2412) and Rule 54(d), F.R.Civ.P. The district court denied this motion finding the government's position was substantially justified. The district court denied a motion to alter or amend. The 10th Circuit Court of Appeals affirmed this denial of fees under a strict standard of review, finding that despite their own contrary opinion on the merits, they could not overturn the district court's denial of fees unless that decision was "whimsical or manifestly unreasonable." A petition for rehearing and rehearing *en banc* was also denied.

Ultimately, the agencies completed the SEIS and concluded that the road should not be built through the wetlands.

REASONS FOR GRANTING THE WRIT

I. THE TENTH CIRCUIT'S OPINION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS CONCERNING THE APPROPRIATE METHOD OF REVIEW FOR DECISIONS ON ATTORNEY FEES UNDER THE EQUAL ACCESS TO JUSTICE ACT.

The fundamental issue presented in this case is whether the Tenth Circuit Court of Appeals has distorted the holding of *Pierce v. Underwood*, 487 US 552 (1988) to frustrate the purpose of the Equal Access to Justice Act (EAJA) (28 USC § 2412) by denying attorneys fees to citizens who successfully sue the government.

The policy underlying EAJA was to reduce the disparity in resources between the US government and those seeking review of or defending against unreasonable government action by reimbursing those citizens and small businesses who were successful in this activity. See H.Rep. No. 1418, 96th Cong., 2d Sess. 5-6, 9-10 (1980), reprinted in 1989 US Code Cong. & Admin. News at 4984, 4988-89, cited in *Citizens Council of Delaware County v. Brinegar*, 741 F.2d 584, 589-90 (3rd Cir. 1984). EAJA provides for this fee shifting to assist those willing to litigate meritorious claims against the government who are ultimately successful. *US v. Paisley*, 957 F.2d 1161, 1164 (4th Cir. 1992). The details of such fee shifting and how the courts are to determine the appropriateness of EAJA awards has been undergoing refinement for more than a decade but has now been severely undermined by the Tenth Circuit.

In *Pierce v. Underwood*, 487 US 552 (1988) this Court determined that an abuse of discretion standard was appropriate in the review by appellate courts of district court decisions awarding or denying EAJA attorney fees, granting "deferential review of a district court's decision regarding attorney fees under EAJA." 487 US 563. The *Pierce* court also discussed the appropriate manner of reviewing district court decisions concerning whether the government's position was "substantially justified," the issue here. 487 US 563.

After rejecting *de novo* appellate court review in favor of an abuse of discretion standard, the *Pierce* court reviewed the "actual merits of the Government's litigating position," including the statutory language, the case law the government relied on to support its position, and the opposing case law cited by the respondents to determine if the district court was correct in its decision that the government's position was not substantially justified. 487 US 569-71.

The Tenth Circuit has adopted a distorted and crabbed view of the abuse of discretion analysis required by *Pierce* which has the effect, as here, of essentially protecting from review an erroneous denial of EAJA fees to a prevailing plaintiff. While starting with *Pierce*, Slip Op. at 5, App. at 4-5, the court reviewed its prior merits opinion in this matter, quoted the portion of that opinion which found nothing in then-existing case law to support the government's position, but then turned away from its proper duty of review and "rubber-stamped" the district court opinion. The appellate court held that since the district court decision was "neither 'whimsical' nor 'manifestly unreasonable' " it must be sustained under the

abuse of discretion standard. Slip Op. at 8, App. at 8. This is clear error, inconsistent with *Pierce*, and in conflict with other circuit courts.

The Tenth Circuit has now authored over one hundred opinions using its "whimsey" standard as an elaboration of the abuse of discretion standard. While there may be some basis for this standard in reviewing evidence-intensive trial decisions, where the standard originated, see *FDIC v. Oldenburg*, 34 F.3d 1529, 1555 (10th Cir. 1994), there is little reason to apply it in the EAJA fees context, particularly here, where the district court is considering the fees application *in light of the law as set forth by the appeals court*. This is clearly a distortion of the *Pierce* standard.

The difference is also evident when the decision here is compared with EAJA decisions from other circuits effectuating the *Pierce* standard. Take *US v. Paisley*, 957 F.2d 1161, 1165-68 (4th Cir. 1992). That court distinguished *Pierce*, where the underlying merits portion of the case was settled, from cases like the present case where the merits were litigated and then the fee application presented to the district court. The *Paisley* court found that *Pierce* set out a level of deference to the trial court "considerably short of a simple accept-on-faith, rubber-stamping of district court decisions on this issue." 957 F.2d at 1166. That court then tracked the *Pierce* analysis, reviewing the "objective indicia" of the strength of the government's position, finding that the district court had erred as a matter of law, and that that was an abuse of discretion. 957 F.2d 1165.

Perhaps more significantly, the *Paisley* court looked at the merits decisions that it and this Court had entered and *substantively reviewed the district court fees decision in light of those decisions*. The conclusion: the rationales of the merits decision(s) are the "most powerful available indicators of the strength, hence reasonableness, of the ultimately rejected position." 957 F.2d at 1167.

The Seventh Circuit has used a similar in-depth analysis in a recent EAJA case which directly conflicts with the Tenth Circuit approach as well. In *US v. Hallmark Construction Co.*, 200 F.3d 1076 (7th Cir. 2000), that court explained that the *Pierce* abuse of discretion standard "does not dilute our meaningful examination of the district court's decision." Then the court remanded for further explanation of the district court's denial of fees in light of the merits opinion which so strongly favored the defendant against the government, relying on earlier cases with similar findings. See, *Marcus v. Shalala*, 17 F.3d 1033, 1037 (7th Cir. 1994).

The Eighth Circuit also engages in intensive review of these district court decisions on EAJA applications. Thus, in *Friends of the Boundary Waters Wilderness v. Thomas*, 53 F.3d 881, 885 (8th Cir. 1995) the court used its own opinion on the merits as the starting point for reviewing and reversing the district court's denial of fees. " . . . our conclusion that the Chief's position was plainly contrary to existing law counsels so strongly against the conclusion that the Chief's position was substantially justified that it must determine the outcome." See also *Herman v. Schwent*, 177 F.3d 1063 (8th Cir. 1999).

The DC Circuit has also held that a decision on the merits may in essence resolve the substantial justification issue where the standards used are close and all issues are resolved, as they were here. See *Contractor's Sand and Gravel, Inc. v. Federal Mine Safety and Health Review Comm'n.*, 199 F.3d 1335 (DC Cir. 2000) (agency decision). And the Second Circuit has used this standard for many years. See, e.g. *Federal Election Comm'n. v. Political Contributions Data, Inc.*, 995 F.2d 383 (2nd Cir. 1993).

Clearly, the Tenth Circuit's rubber stamp failure to genuinely review the district court decision is in conflict with most other circuits. This Court should resolve this impasse and make the review standard the same for litigants in the intermountain region as that used in the rest of the country.

The other problem with the Tenth Circuit opinion is that it contradicts traditional rules of the law of the case, as established both at common law and by this Court. In *Christianson v. Colt Indus. Operating Corp.*, 486 US 800 (1988) and numerous other cases, this doctrine makes clear that decisions of a court, or a panel of a court, are binding as to future litigation of those same issues in that case.

Here, however, ignoring the law of the case that it had established itself in the merits phase of the case, the court of appeals concluded that it must defer to the district court's odd interpretation of the appellate court's own opinion unless that opinion was "whimsical or manifestly unreasonable." Slip. Op. at 7-8, App. at 8. Finding that it was neither, the court of appeals affirmed this

district court rewrite of its opinion. This violates the law of the case and is an improper application of *Pierce*.

CONCLUSION

The Tenth Circuit has undercut the standard of review articulated by this Court in *Pierce* and established a policy of review of EAJA fee denials which destroys the key aspects of that statute. By rubber-stamping the district court denial in the face of its own contrary decision on the merits of the case and its own discussion of the inadequate basis for the government's position, that court has departed from the procedure used in numerous other circuits and thwarted the intent of Congress in the act. This Court should grant certiorari to resolve this conflict in the circuits and this improper application of its earlier case.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

THOMASINE ROSS; STANLEY ROSS; ANJANETTE BITSIE; PAMINA YELLOWBIRD; JASON DANIELS; and WETLANDS PRESERVATION ORGANIZATION and KANSAS UNIVERSITY ENVIRONS, Kansas unincorporated associations, Plaintiffs-Appellants, v. FEDERAL HIGHWAY ADMINISTRATION; DAVID GEIGER, in his official capacity as Division Administrator, Federal Highway Administration; MARK BUHLER, TOM TAUL, DEAN NEIDER, in their official capacities as County Commissioners of Douglas County, Kansas; and E. DEAN CARLSON, in his official capacity as Kansas Secretary of Transportation, Defendants-Appellees.	No. 99-3269 (D. Kansas) (D.C. No. Civ-97-2132-GTV) (Jan. 10, 2001)

ORDER AND JUDGMENT*

Before **KELLY, ANDERSON**, and **HENRY**, Circuit Judges.

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*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Plaintiffs brought this action seeking declaratory and injunctive relief against the defendant federal and state officials. They contended that in planning and building a highway near Lawrence, Kansas, defendants failed to comply with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4347. The district court found in favor of the plaintiffs, and enjoined the defendants from taking any further action on the uncompleted eastern portion of the highway project until the requirements of NEPA had been met. *See Ross v. Federal Highway Administration*, 972 F.Supp. 552, 562-63 (D. Kan. 1997). This court affirmed that judgment in *Ross v. Federal Highway Administration*, 162 F.3d 1046 (10th Cir. 1998) [hereinafter *Ross II*]. Plaintiffs then filed a motion in the district court for attorneys' fees and costs pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, and Fed.R.Civ.P. 54(d). The district court denied both fees and costs. The plaintiffs now appeal. We have jurisdiction pursuant to 28 U.S.C. § 1291 and affirm the judgment of the district court.

I. BACKGROUND

As the facts of this case were described in detail in *Ross II*, 162 F.3d at 1048-50, we will only briefly recount that background.

In 1986, federal, state, and local officials began to plan the South Lawrence Trafficway, a highway bypass which was supposed to traverse the south side of Lawrence, Kansas. The project was jointly funded under the Federal-Aid Highway Act, 23 U.S.C. §§ 101-189. Most of the highway was constructed and is in use. However,

before the eastern portion of the project could be built, a neighboring educational institution (Haskell Indian Nation University), as well as several community groups, raised objections to its location. These objections appeared to necessitate a Supplemental Environmental Impact Statement (SEIS) under NEPA. Instead of completing the SEIS, though, the federal and state highway officials decided to "defederalize" the unbuilt eastern segment of the highway.

Although the federal government had funded a significant percentage of the trafficway's total coast [sic], relatively little federal money had been spent directly on the eastern segment, which was to be primarily paid for by the state. Apparently, federal and state highway officials concluded that the eastern segment could consequently be "defederalized" – i.e. redefined as an independent state project. If the project were thus redefined, NEPA would not apply, and an SEIS would not be required. Accordingly, in early 1997, the Federal Highway Administration published a notice of its intent to withdraw from both the eastern segment of the project and the SEIS, which would allow the state to proceed with construction.

The plaintiffs then sued, arguing that this defederalization was improper. The district court agreed; it ruled that because all federal appropriations for the trafficway had included the eastern segment in the trafficway's description, the entire project should be considered federal, even if little federal money was actually to be spent on the eastern segment. It therefore enjoined further action on the eastern segment, pending completion of the SEIS. *Ross*, 972 F.Supp. at 562-63.

On appeal, this court upheld the ruling of the district court, although our rationale was slightly different. We held that by 1997, the "advanced stage" of the bypass collaboration meant "it was simply too late for the state of Kansas to convert the eastern segment into a local project." *Ross II*, 162 F.3d at 1052-53. Despite the relatively small federal expenditures directly related to the eastern segment, we wrote, "[t]he federal nature of the trafficway was so pervasive that the Kansas authorities could not rid the project of federal involvement simply by withdrawing the last segment of the project from federal funding." *Id.* at 1053 (citations omitted).

The plaintiffs next filed a motion in the district court for attorneys' fees and costs. The district court denied attorneys' fees against both the federal and state defendants, and on separate grounds also denied costs. The plaintiffs now appeal.

II. DISCUSSION

A. Denial of Attorneys' Fees from Federal Defendants

Under the EAJA, a party that prevails in a civil action against the United States is entitled to fees and other expenses, "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). In the present case, the district court found that the government's litigating position was substantially justified. We review the district court's ruling on this question for an abuse of discretion. *Pierce v.*

Underwood, 487 U.S. 552, 562 (1988); *Gilbert v. Shalala*, 45 F.3d 1391, 1394 (10th Cir. 1995).

In order to determine whether the federal government's position was substantially justified, a court must ask whether that position was justified "in substance or in the main." *Pierce*, 487 U.S. at 564. A position is substantially justified if it has "a reasonable basis both in law and fact," or is "justified to a degree that could satisfy a reasonable person." *Id.* at 565. Here, the district court found that when the government announced its intent to withdraw from the SEIS, its position was reasonable, based on "the case law governing in 1997." Aplt's Supp.App. at 22 (District Court Order filed May 24, 1999).

Applying this standard, the district court placed particular weight on *Village of Los Ranchos de Albuquerque v. Barnhart*, 906 F.2d 1477 (10th Cir. 1990). In *Los Ranchos*, the federal government had been involved in preparing an environmental impact statement (EIS) for a proposed highway river crossing project in New Mexico. The river crossing project was near another major federal project, a highway interchange, but had been "segmented" from the interchange for funding purposes. *Id.* at 1482. The federal government withdrew from the river crossing project after completing the EIS, but before construction began; the river crossing was to be funded thereafter by non-federal authorities. Neighbors of the river crossing who were opposed to the project then sued. They argued that the project could not be defederalized for two reasons: because the prior federal involvement with the EIS precluded defederalization, and because the river crossing had been improperly separated from the federal highway interchange project.

This court held that both segmentation and defederalization had been proper. We emphasized that because the federal government's involvement had ended very early in the project, and because the federal monetary contribution had been a very small fraction of the river crossing's expected cost, federal involvement was minimal, and defederalization was permissible. *Los Ranchos*, 906 F.2d at 1480-82. We also held that segmentation had been proper. "Even if a local project terminates at a point of juncture with a federally funded project," we wrote, such a juncture would not "preclude" segmentation of the two projects. *Id.* at 1483.

In the present action, the district court emphasized that before our decision on the merits in this case, *Los Ranchos* was the controlling case in this circuit. It found that the Federal Highway Administration

> believed that, under its reading and interpretation of *Village of Los Ranchos* and other federal appellate court case law, the eastern segment of the [South Lawrence] trafficway was not a "major federal action" because it was to be completed without the use of further federal funds and because the FHWA no longer had the authority to exercise control in the planning or construction of the segment.

Aplt's Supp.App. at 22. The district court concluded that under *Los Ranchos*, there was a reasonable basis for both the government's action and its litigating position.

The plaintiffs now argue that even in 1997, the law suggested defederalization of the eastern segment would be unreasonable. Essentially, the plaintiffs maintain that

Los Ranchos is factually distinct from the Kansas controversy, making it valueless as precedent. They further contend that all relevant cases other than *Los Ranchos* have rejected defederalization.

Our earlier opinion in this case does indeed state that "nothing in *Los Ranchos*" supports the government's "decision to 'defederalize' the eastern segment of the South Lawrence trafficway." *Ross II*, 162 F.3d at 1053. The present case, we found, differs "significantly" from the facts in *Los Ranchos*. *Id.* It also approves of the cases plaintiffs cited in support of their position, especially *Scottsdale Mall v. State of Indiana*, 549 F.2d 484 (7th Cir. 1977). In *Scottsdale Mall*, the state had attempted to defederalize a highway project in order to circumvent NEPA. The Seventh Circuit ruled that because there had been significant federal involvement in all stages of the project prior to the attempted defederalization, the attempt was improper. *Id.* at 488-90. As a result, plaintiffs urge us to find that the government's position was not substantially justified.

However, under the "abuse of discretion" standard of review, we cannot reverse the district court unless we have "a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *McEwen v. City of Norman*, 926 F.2d 1539, 1553-54 (10th Cir. 1991). The district court's judgment may only be reversed for an abuse of discretion if it appears "arbitrary, capricious, whimsical, or manifestly unreasonable." *FDIC v. Oldenburg*, 34 F.3d 1529, 1555 (10th Cir. 1994).

Despite the plaintiffs' contentions and our decision in *Ross*, the district court's conclusion was neither "whimsical" nor "manifestly unreasonable." Although *Scottsdale Mall* supported the plaintiffs' position (and raised questions about the government's), it was not binding authority in this circuit. *See Garcia by Garcia v. Miera*, 817 F.2d 650, 658 (10th Cir. 1987) (affirming that the decisions of one circuit court of appeals are not binding upon another circuit). In contrast, *Los Ranchos*, a case from within our circuit, addressed issues of highway segmentation and defederalization and provided some support for the government's contentions.

Here, the district court found that because *Los Ranchos* appeared to be the most relevant precedent, it was not unreasonable for the Federal Highway Administration to rely upon that case in formulating its arguments. In other words, in order to have a "substantially justified" litigating position, the FHWA need not have predicted or foreseen our decision on the merits here, which followed the reasoning of *Scottsdale Mall* and distinguished *Los Ranchos*. This conclusion by the district court was neither "whimsical" nor "manifestly unreasonable." We therefore conclude that the district court did not abuse its discretion in denying the plaintiffs' motion for attorneys' fees.[1]

---

[1] Because we conclude *Los Ranchos* provides sufficient support for the district court's ruling, we need not address the relevance of 23 U.S.C. § 145.

B. Denial of Costs From All Defendants

Because the plaintiffs did not file a bill of costs within thirty days after the final judgment, as required by the local court rules, the district court denied plaintiffs their costs. *See* D. Kan. Rule 54.1. Plaintiffs state that while they did not file a bill of costs on the specific form required by the local Kansas rule, they did submit their costs as part of an affidavit for attorneys' fees under the EAJA. This, they propose, "compl[ies] with the intent" of the Kansas rule. Aplt's Br. at 24.

We have on many occasions found that "the district court is entitled to considerable deference in its interpretation and application of its own rules of practice and procedure." *Mitchell v. Maynard*, 80 F.3d 1433, 1447 (10th Cir. 1996). Although we might have held differently (noting the confusion that could have resulted from the EAJA application), under this deferential standard, it was permissible for the district court to find that plaintiffs' affidavit did not sufficiently comply with the local rule requiring a bill of costs.

III. CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

Entered for the Court,

Robert H. Henry
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

THOMASINE ROSS, STANLEY ROSS, ANJANETTE BITSIE, PAMINA YELLOWBIRD, JASON DANIELS, WETLANDS PRESERVATION ORGANIZATION, and KANSAS UNIVERSITY ENVIRONS, Plaintiffs, vs. FEDERAL HIGHWAY ADMINISTRATION; DAVID GEIGER, Division Administrator, Federal Highway Administration; MARK BUHLER, TOM TAUL, DEAN NEIDER, Douglas County, Kansas Commissioners; and E. DEAN CARLSON, Secretary of the Kansas Department of Transportation, Defendants.	CIVIL ACTION No. 97-2132-GTV (FILED MAY 24, 1999)

MEMORANDUM AND ORDER

Plaintiffs brought this action seeking declaratory and injunctive relief against all defendants for their failure to comply with the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321 *et seq.*, in the planning and construction of the eastern leg of the South Lawrence Trafficway in Douglas County, Kansas. After an evidentiary hearing, this court found in favor of plaintiffs, and enjoined defendants from taking any action or expending

any funds to complete the eastern leg of the trafficway. On appeal, this court's order was affirmed by the United States Court of Appeals for the Tenth Circuit. *Ross v. Federal Highway Admin.*, 162 F.3d 1046 (10th Cir. 1998). The case is now before the court on plaintiffs' motion (Doc. 65) for attorneys' fees and costs pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412, and Fed.R.Civ.P. 54(d). For the reasons set forth in this memorandum and order, plaintiffs' motion is denied.

I. BACKGROUND

The instant motion for attorneys' fees and costs arises out of the development and construction of a southern bypass around Lawrence, Kansas, known as the South Lawrence Trafficway. In 1986, state and federal officials began planning the trafficway as a jointly funded federal-aid highway project. Under the Federal-Aid Highway Act, 23 U.S.C. § 101 *et seq.*, states may seek reimbursement for a percentage of the costs incurred for certain highway projects. States seeking federal highway funds must submit to the Federal Highway Administration ("FHWA") a list of proposed transportation projects. Upon final approval of the project and compliance with applicable federal laws, including the National Environmental Policy Act ("NEPA"), the FHWA reimburses the state for a portion of the project cost. In order to be eligible for federal funding, the state must prepare an environmental impact statement.

In the instant case, the FHWA approved and released to the public a final environmental impact statement on January 4, 1990. On June 5, 1990, the FHWA issued a

Record of Decision, selecting the route for the eastern leg of the Trafficway along the existing 31st Street in the City of Lawrence. In July and October 1993, representatives of Haskell Indian Nations University expressed concern about the 31st Street alignment that is adjacent to the Haskell campus. Following the passage of a Haskell Board of Regents' resolution opposing the 31st Street alignment, the FHWA, the Kansas Department of Transportation ("KDOT"), and officials from Douglas County, Kansas, determined that a supplemental environmental impact statement ("SEIS") was needed to address Haskell's spiritual, academic, and developmental concerns.

In April 1994, to facilitate construction, KDOT requested that the FHWA allow segmentation of the trafficway project. In May 1994, the FHWA approved KDOT's request to divide the trafficway project into four segments with three segments on the western leg and the remaining segment being the eastern leg. The three segments of the western leg of the trafficway have since been completed and are in use.

On October 2, 1995, the FHWA, KDOT, and Douglas County released a draft SEIS addressing the eastern segment of the trafficway for public comment. After a public hearing on the draft SEIS, SEIS process stalled because the FHWA, KDOT, and Douglas County were unable to reach an agreement on the alignment of the eastern leg.

In February 1997, KDOT, in an attempt to expedite the project, forwarded to the FHWA an agreement between KDOT and Douglas County to construct the eastern leg of the trafficway as a nonfederal project, without the use of federal-aid highway funds. On March

6, 1997, the FHWA published a notice in the Federal Register withdrawing the Notice of Intent to complete an SEIS.

On March 12, 1997, plaintiffs filed their complaint seeking to enjoin further action on the project. On March 15, 1997, this court granted a preliminary injunction. Following a hearing on May 2, 1997, the court issued a permanent injunction preventing the FHWA, KDOT, and Douglas County from taking further action on the eastern leg of the trafficway pending completion of the SEIS process, issuance of a final SEIS, and entry of a new Record of Decision. Applying the arbitrary and capricious standard of review set forth in § 706(2)(A) of the Administrative Procedure Act, the court concluded that defendants violated NEPA by not completing the SEIS.

Defendants appealed to the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit affirmed this court's decision. As prevailing parties,[1] plaintiffs now move for attorneys' fees and costs.

II. DISCUSSION

Pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, and Fed. R. Civ. P. 54(d), plaintiffs seek attorneys' fees and costs from both the federal and state defendants. The court concludes that plaintiffs are not entitled to recover attorneys' fees or costs from any defendant.

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[1] It is undisputed that plaintiffs are prevailing parties.

A. Attorneys' Fees From Federal Defendants

Plaintiffs seek attorneys' fees from the federal defendants pursuant to § 2412 of the Equal Access to Justice Act ("EAJA"). The relevant provision of the EAJA provides:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A). In determining whether the government's position was "substantially justified," the court must look to the "action or failure to act by the agency upon which the civil action is based" and "to the position taken by the United States in the civil action." *See id.* § 2412(d)(2)(D). "[T]he test of substantial justification is essentially one of reasonableness in both law and fact." *United States v. 2,116 Boxes of Boned Beef*, 726 F.2d 1481, 1486-87 (10th Cir. 1984). In the Tenth Circuit, "the reasonableness test breaks down into three parts: the government must show 'that there is a reasonable basis . . . for the facts alleged . . . , that there exists a reasonable basis in law for the theory it propounds; and that the facts alleged will reasonably support the legal theory advanced.' " *Gatson v. Bowen*, 854 F.2d 379, 380 (10th Cir. 1988) (quoting *2,116 Boxes of Boned Beef*, 726 F.2d at 1487).

In the instant case, the Tenth Circuit held on appeal that the FHWA acted arbitrarily and capriciously when it discontinued the SEIS process and withdrew from the completion of the trafficway. The appellate court's finding of arbitrary and capricious conduct, however, does not, in and of itself, mandate an EAJA award. "The legislative history of the [EAJA] indicates that the substantial justification standard 'should not be read to raise a presumption that the Government position was not substantially justified, simply because it lost the case.' " *Cohen v. Bowen*, 837 F.2d 582, 585 (2d. Cir. 1988) (quoting H.R. Rep. No. 96-1418, 96th Cong., 2d. Sess., at 11 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4990). "Rather, the standard is intended to caution agencies to carefully evaluate their case and not to pursue those which are weak or tenuous. At the same time, the language of the section protects the government when its case, though not prevailing, has a reasonable basis in law and fact." *Id.* (citing H.R. Rep. 96-1418, at 14, 1980 U.S.C.C.A.N. at 4993). Thus, even after a merits determination that an agency's conduct was arbitrary and capricious, the government may establish that its position was substantially justified by showing that it had a reasonable basis in law and fact.

The federal defendants argue in the instant case that the FHWA's decision to discontinue the NEPA process, specifically the SEIS, was reasonable and, therefore, substantially justified. At both the district and appellate court level, the federal defendants argued that the FHWA was not required to perform an SEIS because the eastern segment of the trafficway was not a "major federal action" as defined by NEPA. Pursuant to NEPA, federal agencies are required to prepare, *inter alia*, environmental

impact statements for major federal actions in order to investigate and consider the environmental consequences of proposed federal activities on the human environment. If the federal defendants had a reasonable basis in law and fact for arguing that the eastern leg of the trafficway was not a major federal action, the government's position was substantially justified.[2]

Both the FHWA's decision to withdraw from the construction of the eastern segment of the trafficway and the government's legal arguments are based on case law governing in 1997, specifically *Village of Los Ranchos de Albuguergue v. Barnhart*, 906 F.2d 1477 (10th Cir. 1990). According to the federal defendants, the FHWA withdrew from the construction of the eastern segment because it believed that, under its reading and interpretation of *Village of Los Ranchos* and other federal appellate court case law, the eastern segment of the trafficway was not a "major federal action" because it was to be completed without the use of further federal funds and

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[2] As stated above, the court must consider both the "action or failure to act by the agency upon which the civil action is based" and "the position taken by the United States in the civil action." *See* 28 U.S.C. § 2412(d)(2)(D). In the instant case, an analysis of the reasonableness of the FHWA's decision to withdraw from the construction of the eastern segment and to not complete the SEIS directly parallels an analysis of the government's legal position in this civil action. The reasonableness of both hinge on the application of the undisputed facts to the same case law. The court, therefore, need not address both aspects of the government's position separately, and will collectively refer to the agency action and the government's legal position as "the government's position."

because the FHWA no longer had the authority to exercise control in the planning or construction of the segment.

After reviewing the facts underlying the parties' conflict and the case law governing in 1997, specifically *Village of Los Ranchos*, the court concludes that there was a reasonable basis for the facts alleged by the federal defendants, that there existed a reasonable basis in law for the federal defendant's legal theory, and that the facts alleged reasonably supported their legal theory. *See Gatson*, 854 F.2d at 380. Accordingly, the government's position was reasonable and, therefore, substantially justified.

B. Attorneys' Fees From State Defendants

Plaintiffs seek attorneys' fees from the state defendants pursuant to Fed. R. Civ. P. 54(d). To successfully seek attorneys' fees under Fed. R. Civ. P. 54(d), a moving party must "specify . . . the statute, rule, or other grounds entitling the moving party to the award." In the instant case, plaintiffs argue that they are entitled to attorneys' fees under 42 U.S.C. § 1988. The court disagrees. Section 1988(b) only authorizes the award of attorneys' fees expended in actions to enforce the provisions of 42 U.S.C. §§ 1981, 1981a, 1982, 1983, 1985, 1986, & 13981, 20 U.S.C. § 1681 *et seq.*, 42 U.S.C. § 2000bb *et seq.*, and 42 U.S.C. § 2000d *et seq.* Plaintiffs' underlying action is based on none of these provisions. Accordingly, plaintiffs request for attorney's fees pursuant to Fed. R. Civ. P. 54(d) is denied.

C. Costs From All Defendants

Plaintiffs also seek costs from both state and federal defendants pursuant to Fed. R. Civ. P. 54(d). D. Kan. Rule 54.1 provides:

> The party entitled to recover costs shall file a bill of costs within 30 days (a) after the expiration of time allowed for appeal of a final judgment or decree, or (b) after receipt by the clerk of an order terminating the action on appeal. . . . The failure of a prevailing party to timely file a bill of costs shall constitute a waiver of any claim for costs.

Because plaintiffs did not file a bill of costs within 30 days after final judgment in the instant case, they have waived any claim for costs under Fed. R. Civ. P. 54(d) and D. Kan. Rule 54.1.

IT IS, THEREFORE, BY THE COURT ORDERED that plaintiffs motion (Doc. 65) for attorneys' fees and costs is denied.

The clerk shall mail copies of this order to counsel of record.

IT IS SO ORDERED.

Dated at Kansas City, Kansas, this 24 day of May 1999.

/s/ G. T. VanBebber
G. T. VanBebber
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

THOMASINE ROSS, et al., Plaintiffs, vs. FEDERAL HIGHWAY ADMINISTRATION, et al., Defendants.	)	CIVIL ACTION No. 97-2132-GTV

ORDER

(Filed Jul. 14, 1999)

Plaintiffs brought this action seeking declaratory and injunctive relief against defendants for their failure to comply with the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321 *et seq.*, in the planning and construction of the eastern leg of the South Lawrence Trafficway. After an evidentiary hearing, the court found in favor of plaintiffs, and enjoined defendants from taking any action or expending any funds to complete the eastern leg of the trafficway. On appeal, the court's order was affirmed. *See Ross v. Federal Highway Admin.*, 162 F.3d 1046 (10th Cir. 1998). Plaintiffs then moved for attorneys' fees and costs pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412, and FED. R. CIV. P. 54(d). Because the court concluded that the federal defendants' decision to discontinue the NEPA process was substantially justified, plaintiffs motion for fees was denied. The court also denied plaintiffs' request for fees from the state defendants due to plaintiffs' failure to specify a statue

[sic], rule, or other grounds authorizing such an award. Finally, the court denied plaintiffs' request for costs because plaintiffs failed to comply with the provisions of D. Kan. Rule 54.1. The case is before the court on plaintiffs' motion (Doc. 76) to alter or amend judgment pursuant to Fed. R. Civ. P. 59(e).

A motion to alter or amend judgment pursuant to Fed. R. Civ. P. 59(e) may be granted only if plaintiffs can establish: (1) an intervening change in controlling law; (2) the availability of new evidence that could not have been obtained previously through the exercise of due diligence; or (3) the need to correct clear error or prevent manifest injustice. *Brumark Corp. v. Samson Resources Corp.*, 57 F.3d 941, 948 (10th Cir. 1995). Plaintiffs proceed exclusively on the third prong. In analyzing this issue, the court must bear in mind that motions to alter or amend judgment are regarded with disfavor and generally granted only if the court has obviously misapprehended a party's position or the facts. *Eichenwald v. Krigel's, Inc.*, 908 F. Supp. 1531, 1564-65 (D. Kan. 1995).

With the above standards in mind, the court concludes that it did not misapprehended plaintiffs' argument and that it correctly applied the facts of the case to the relevant law. The court's order denying plaintiffs' motion for fees and costs was not erroneous. Accordingly, plaintiffs' motion to alter or amend is denied.

IT IS, THEREFORE, BY THE COURT ORDERED that plaintiffs' motion (Doc. 76) to alter or amend judgment is denied.

The case is closed.

The clerk shall mail copies of this order to counsel of record.

IT IS SO ORDERED.

Dated at Kansas City, Kansas, this 14 day of July 1999.

/s/ G. T. VanBebber
G. T. VanBebber
United States District Judge

United States District Court,
D. Kansas.

Thomasine ROSS, Stanley Ross, Anjanette Bitsie, Pamina Yellowbird, Jason Daniels, Wetlands Preservation Organization, and Kansas University Environs, Plaintiffs,

v.

FEDERAL HIGHWAY ADMINISTRATION; David Geiger, Division Administrator, Federal Highway Administration; Mark Buhler, Tom Taul, Dean Neider, Douglas County, Kansas Commissioners; and E. Dean Carlson, Secretary of the Kansas Department of Transportation, Defendants.

Civil Action No. 97-2132-GTV.

July 17, 1997.

Robert V. Eye, Irigonegaray & Associates, Topeka, KS, Bruce M. Plenk, Lawrence, KS, for plaintiffs.

Helen Mountford, Federal Highway Administration, Kansas City, MO, Jackie A. Rapstine, Office of U.S. Attorney, Topeka, KS, for Federal Highway Administration, Division Administrator of Federal Highway Administration.

Timothy P. Orrick, Mark Parkinson, Parkinson, Foth & Reynolds, Lenexa, KS, for Commissioners of Douglas County, Kansas.

Daniel D. Crabtree, Stinson, Mag & Fizzell, P.C., Overland Park, KS, Vicky S. Johnson, Michael B. Rees, Office of Chief Counsel, Gelene D. Savage, Kansas Dept. of Transp., Topeka, KS, Stephen P. Chinn, Patricia A. Konopka, Stinson, Mag & Fizzell, P.C., Kansas City, MO, for Secretary of Kansas Dept. of Transp.

MEMORANDUM AND ORDER

VAN BEBBER, Chief Judge.

In this case, plaintiffs allege that defendants are violating the National Environmental Policy Act (NEPA), specifically 42 U.S.C. §§ 4331-4335, by continuing construction of the South Lawrence Trafficway in Douglas County, Kansas prior to completing a supplemental environmental impact statement (SEIS). In their amended complaint, plaintiffs seek judicial review pursuant to the Administrative Procedures Act (APA), 5 U.S.C. § 701 *et seq.*, mandamus relief pursuant to 28 U.S.C. § 1361,[1] declaratory relief pursuant to 28 U.S.C. § 2201, and injunctive relief pursuant to 28 U.S.C. § 2202. For the reasons set forth below, the court finds that it has subject matter jurisdiction and is, therefore, prepared to rule upon the merits of the case. Accordingly, the court issues an injunction prohibiting defendants from taking any action or expending any funds to complete the eastern leg of the Trafficway before completing the SEIS process, issuing a final SEIS, and entering a new Record of Decision.

Procedural Background

Plaintiffs filed their complaint and motion for preliminary injunction on March 12, 1997.[2] At a March 28, 1997

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[1] "The availability of a remedy under the APA technically precludes [plaintiffs'] request for a writ of mandamus." *Mt. Emmons Mining Co. v. Babbitt*, 117 F.3d 1167, 1170 (10th Cir.1997).

[2] There have been two previous cases involving the Trafficway. In *Northern Crawfish Frog (Rana Areolata Circulosa) v.*

hearing, the court focused upon plaintiffs' claims against the Federal Highway Administration and Division Administrator David Geiger (federal defendants) to determine if the court has subject matter jurisdiction. NEPA applies to federal agencies undertaking "major federal actions significantly affecting the quality of the human environment". 42 U.S.C. § 4332(2)(C); *see Village of Los Ranchos de Albuquerque v. Barnhart*, 906 F.2d 1477, 1480 (10th Cir.1990) ("The requirements of NEPA apply only when the federal government's involvement in a project is sufficient to constitute 'major federal action.' "). The court, therefore, observed that its subject matter jurisdiction is contingent upon a finding of "major federal action" in the Trafficway not yet constructed.

At the March 28 hearing, the court also commented that plaintiffs seeking to enforce the procedural requirements of NEPA, which contains no private cause of action, are subject to the APA's judicial review provisions. *See Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 882-83, 110 S.Ct. 3177, 3185-86, 111 L.Ed.2d 695 (1990); *Committee to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 448 (10th

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Federal Highway Admin., 858 F.Supp. 1503 (D.Kan.1994), the plaintiffs requested an injunctive order halting acquisition of right-of-way and construction activity of the Trafficway until the Federal Highway Administration (FHWA) adopted a new route that did not require taking protected park land, and until the FHWA prepared and approved a supplemental environmental impact statement. Judge Crow granted the FHWA's motion for summary judgment. In *Kansas Natural Resource v. Federal Highway Admin.*, No. 95-2495-GTV (D.Kan. Nov. 9, 1995), the court denied the plaintiffs' preliminary injunction motion for a "town hall" rather than the scheduled "open house" public hearing.

Cir.1996); *Catron County Bd. of Comm'rs v. United States Fish & Wildlife Serv.*, 75 F.3d 1429, 1434 (10th Cir.1996); *Southern Utah Wilderness Alliance v. United States Forest Serv.*, 897 F.Supp. 1394, 1397 n. 1 (D.Utah 1995). The court concluded that federal defendants' actions at issue would be reviewed under the APA and modified the briefing schedule outlined in D.Kan.R. 83.7 to accommodate the final hearing scheduled for early May. (Doc. 14.) The court then authorized a preliminary injunction (Doc. 12), which was memorialized in an order filed April 15, 1997 (Doc. 21).

The court conducted a final hearing on May 2, 1997, during which the court noted that its subject matter jurisdiction is intertwined with the merits of the action. Accordingly, both the merits of plaintiffs' claims against federal defendants as well as the court's subject matter jurisdiction over plaintiffs' claims revolve around federal defendants' conclusion that the unconstructed Trafficway involved no "major federal action."[3] If jurisdiction is lacking, the court noted that it would dismiss federal defendants and that it lacked authority to exercise supplemental jurisdiction over the state and local defendants. *See Tatum v. Everhart*, 954 F.Supp. 225, 230 (D.Kan.1997). At the conclusion of the May 2 hearing, the

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[3] At the May 2 hearing, the court granted plaintiffs' uncontested motion for leave to file an amended complaint in which plaintiffs allege the APA as a jurisdictional basis, correcting their previous oversight. *See Committee to Save the Rio Hondo*, 102 F.3d at 448 (plaintiffs seeking to enforce NEPA's procedural requirements must rely upon the APA as the basis for their action).

court continued the preliminary injunction pending submission of additional briefing by the parties and the court's resolution of the issues contained therein. (Doc. 33.)

The case is now before the court to determine subject matter jurisdiction and, upon a finding of jurisdiction, the merits of issuing an injunction. The court has considered the arguments of counsel and the evidentiary submissions. Judicial review under the APA is limited to the administrative record with limited exceptions. The exception pertinent here is the necessity for background information. *See Northern Crawfish Frog (Rana Areolata Circulosa) v. Federal Highway Admin.*, 858 F.Supp. 1503, 1508 n. 6 (D.Kan.1994) (citations omitted). Accordingly, the court bases its factual findings upon the administrative record in this case as well as uncontroverted findings from *Northern Crawfish Frog*, a previous case involving the Trafficway.

Pursuant to Fed.R.Civ.P. 52(a), the court makes the following findings of fact and conclusions of law.

Findings of Fact

1. Interest in a southern bypass trafficway around Lawrence began in 1964, and numerous studies were conducted by consultants as well as local, state, and federal agencies.

2. In April 1986, the Federal Highway Administration (FHWA) became involved in the Trafficway project and informed Douglas County and the Kansas Department of Transportation (KDOT) that eligibility for federal

funding necessitated preparation of an environmental impact statement (EIS). On June 23, 1986, the FHWA published a Notice of Intent to Prepare an EIS for the Trafficway in the Federal Register.

3. The Trafficway was conceived as a federal-aid highway project jointly funded by local, state, and federal monies. In a federal-aid highway project, state and local officials contract for the actual planning and construction work, subject to the FHWA's oversight. The FHWA reimburses the state for eligible costs expended on contracts into which state and local officials have entered.

4. On January 4, 1990, the FHWA approved and released to the public a final EIS. On June 5, 1990, the FHWA issued a Record of Decision, selecting the route for the eastern leg of the Trafficway along the existing 31st Street in the City of Lawrence. On April 22, 1993, the United States Army Corps of Engineers (Corps) issued a section 404 permit pursuant to the Clean Water Act for the 31st Street route.[4]

5. In July and October 1993, representatives of Haskell Indian Nations University expressed concern about the 31st Street alignment that is adjacent to the Haskell campus. Following a Haskell Board of Regents' resolution opposing the 31st Street alignment, the FHWA, KDOT, and Douglas County determined that a SEIS was

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[4] The Clean Water Act provides that dredge or fill material may not be discharged into waterways, including wetlands, without a section 404 permit from the Corps. *See* 33 U.S.C. § 1344(a).

needed to address Haskell's spiritual, academic, and development concerns.

6. In April 1994, to facilitate construction phasing and available funding limits, KDOT requested that FHWA allow segmentation of the Trafficway. In May 1994, the FHWA approved KDOT's request to divide the Trafficway into four segments with three segments on the western leg (Kansas Turnpike south to U.S. 40, U.S. 40 south to Clinton Parkway, and Clinton Parkway south and west to U.S. 59) and the remaining segment being the eastern leg, east of U.S. 59. Citing 23 C.F.R. § 771.111(f), the FHWA determined that segmentation provided logical termini, that each segment had independent utility, and that construction of the western segments would not foreclose alternatives for the eastern segment. The three segments of the western leg of the Trafficway have been constructed and are carrying traffic.

7. On October 17, 1994, the FHWA published a Notice of Intent to Prepare a SEIS to address Haskell's concerns. Department of Transportation Notice, 59 Fed.Reg. 52,360 (1994). Approximately one year later, on October 2, 1995, a draft SEIS addressing the eastern leg of the Trafficway was released for public comment. On November 8, 1995, a public hearing was held, at which over 633 people attended. There were 280 written comments, 180 oral comments, and 5 petitions submitted.

8. Cooperating agencies never reached agreement on a preferred alignment to 31st Street. On October 29, 1996, FHWA, Corps, KDOT, and Douglas County discussed defederalizing the project.

9. On December 9, 1996, Douglas County wrote the FHWA, commenting that the SEIS process was "deadlocked" and that the FHWA had yet "to take a stand in writing on any of the three alignments." (Administrative Record Ex. 16.) Douglas County asked that the "FHWA give [its] position in writing and recommend a method to conclude the SEIS process." (AR Ex. 16.)

10. On January 10, 1997, KDOT and Douglas County entered into an agreement to construct the eastern leg of the Trafficway without federal funds. On February 10, 1997, KDOT informed the FHWA of KDOT and Douglas County's agreement, stating that KDOT hoped this information resolved "the question of any further involvement by the [FHWA]." (AR Ex. 19.)

11. On February 4, 1997, plaintiffs' counsel wrote federal defendants and others, asking that the FHWA and Environmental Protection Agency (EPA) take "steps to prevent the expenditure of any additional funds or the undertaking of any construction activities by Douglas County and/or KDOT" on the eastern leg of the Trafficway "until the completion of the [SEIS] and the filing of a new Record of Decision determining an alignment based on the [SEIS]." (AR Ex. 18.)

12. On February 14, 1997, the EPA wrote the FHWA, acknowledging that the EPA's statutory authority to prevent expenditure of funds prior to completion of the SEIS was limited. Nonetheless, EPA shared its belief that "the NEPA process should be completed. . . . "[5] (AR Ex. 17.)

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[5] Although the letter is dated January 14, 1997, federal defendants allege that the date was actually February 14, 1997.

13. On February 21, 1997, the FHWA responded to plaintiffs' counsel's letter, stating that KDOT and Douglas County had agreed to complete the eastern leg of the Trafficway without federal funds and that such agreement was in accord with 23 U.S.C. § 145, which authorizes states to decide which highway projects will include federal funding. Division Administrator David Geiger concluded the letter, observing: "Since no Federal-aid highway funds will be used on the proposed project, we know of no provision in any applicable Federal law or regulation that would allow FHWA to take any of the actions you have requested." (AR Ex. 22.)

14. Also on February 21, 1997, FHWA informed Douglas County that, based upon the agreement between Douglas County and KDOT, "the FHWA will no longer be the lead federal agency for the project."[6] (AR Ex. 21.) On March 6, 1997, FHWA published a Notice of Withdrawal of Intent to Complete a Supplement to the Final EIS in the Federal Register, citing KDOT and Douglas County's agreement not to use federal funds for the project. "Therefore, FHWA is no longer the lead Federal agency for this project and is discontinuing the Supplemental

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[6] Federal defendants contend that they anticipated that KDOT and Douglas County would request additional federal funds for the eastern leg of the Trafficway. This contention is based upon an August 24, 1995 letter on FHWA letterhead to Beverley Worster of the Coalition to Preserve Our Wetlands, stating that KDOT "plans to use Federal-aid funds for construction of the trafficway, but is using only State funds for preliminary engineering and right-of-way acquisition." (AR Ex. 11.)

Environmental document process." Department of Transportation Notice, 62 Fed.Reg. 10,305 (1997).

15. Also on March 6, 1997, the Corps wrote Douglas County, noting that since the FHWA's withdrawal, the "Corps is the only Federal agency with statutory authority for the remaining work," but that its role "is more focused than the FHWA role because [its] authority is limited to [its] Clean Water Act jurisdiction." (AR Ex. 23.)

16. Federal funds in the amount of $10,404,040 have been expended on the Trafficway. All federal funds, with the exception of the $108,300 spent on the Santa Fe Mitigation Site,[7] have been expended on the western segments.

17. On March 12, 1997, plaintiffs filed the above-captioned case, alleging that defendants' defederalization of the eastern leg of the Trafficway is an attempt to circumvent the mandates of NEPA. Plaintiffs seek a declaratory judgment that defendants must complete the SEIS process and issue a new Record of Decision prior to planning, expending, or contracting for the expenditure of funds on the eastern leg of the Trafficway. Plaintiffs also seek injunctive relief that prohibits defendants from planning, expending, or contracting for the expenditure of funds on the eastern leg of the Trafficway prior to

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[7] Mitigation of 11.89 acres that the 31st Street alignment would impact has been accomplished at a triangular area north of 35th Street and east of Haskell. The construction of a water level control device in this area has the potential of flooding 15.3 acres in the off-site location. This creation of wetlands resulted in a net gain of 3.41 acres of wetlands.

completing the SEIS process, issuing a new Record of Decision, and entry of a new Record of Decision.

Conclusions of Law

I. Subject Matter Jurisdiction

As previously noted, the court first must address the question of subject matter jurisdiction. "A court lacking jurisdiction . . . must dismiss the cause at any stage of the proceeding in which it becomes apparent that jurisdiction is lacking." *Laughlin v. Kmart Corp.*, 50 F.3d 871, 872 (10th Cir.) (internal quotations and citation omitted), *cert. denied*, 516 U.S. 863, 116 S.Ct. 174, 133 L.Ed.2d 114 (1995); *see* Fed.R.Civ.P. 12(h)(3). Federal courts are courts of limited jurisdiction. The party seeking the federal forum must establish the basis for the court's jurisdiction. *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 551 (10th Cir.1992). United States district courts have original jurisdiction over actions arising under the laws of the United States. 28 U.S.C. § 1331. Here, plaintiffs seek an APA review of federal defendants' actions allegedly in violation of NEPA.

A. APA

Under the APA, "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702; *see Catron County Bd. of Comm'rs*, 75 F.3d at 1434 (citing *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 882-83, 110 S.Ct. 3177, 3185-86, 111 L.Ed.2d 695 (1990)). Plaintiffs seek an APA review of federal defendants'

actions (1) discontinuing the SEIS and thereby ending the NEPA process for the eastern leg of the Trafficway, (2) withdrawing as lead NEPA agency without arranging for another federal agency to complete the NEPA process, and (3) modifying the previously filed Record of Decision for the Trafficway. (Doc. 20, at 12.) The APA authorizes the reviewing court to "compel agency action unlawfully withheld" and to "hold unlawful and set aside agency actions, findings, and conclusions," which the court finds to be, as plaintiffs allege here, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(1), § 706(2)(A); *see Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16, 91 S.Ct. 814, 823-24, 28 L.Ed.2d 136 (1971) (scope of APA judicial review of agency action); *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1573-75 (10th Cir.1994) (same).

B. NEPA

Congress enacted NEPA "to protect and promote environmental quality. To ensure this protection, [NEPA] establishes 'action forcing' procedures the agencies must follow, such as requiring an agency to prepare either an [EIS] or a [SEIS] under certain circumstances." *Committee to Save the Rio Hondo*, 102 F.3d at 448 (citing 42 U.S.C. §§ 4331(a-c), 4332(2)(C)(i-v)); 40 C.F.R. § 1502.9(c)(1)(i)). An EIS or a SEIS details "the environmental impact of the action; unavoidable adverse environmental effects; alternatives to the action; relationship between the short-term uses and long-term productivity of the affected environment; and irretrievable and irreversible commitments of resources should the action be implemented." *Catron County Bd. of Comm'rs*, 75 F.3d at 1434 (citing 42 U.S.C.

§ 4332(2(c)(i-v)). One purpose of the EIS or SEIS is to allow "critical evaluation of an agency's actions by those outside the agency." *Id.* (citation omitted). NEPA mandates a particular process, not a particular outcome. *Committee to Save the Rio Hondo*, 102 F.3d at 448; *Sierra Club v. Marsh*, 872 F.2d 497, 502 (1st Cir.1989).

As previously noted, NEPA can be invoked only if major federal action has affected significantly the quality of the human environment. 42 U.S.C. § 4332(2)(C). The Tenth Circuit has construed the implementing regulations defining major federal action "to encompass not only actions by the federal government but also nonfederal actions ' "with effects that may be major and which are potentially subject to Federal control and responsibility." ' " *Village of Los Ranchos de Albuquerque*, 906 F.2d at 1482 (quoting *Sierra Club v. Hodel*, 848 F.2d 1068, 1089 (10th Cir.1988) (citing 40 C.F.R. § 1508.18)).

C. *Discussion*

Under an APA review, "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Olenhouse*, 42 F.3d at 1575 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 50, 103 S.Ct. 2856, 2870, 77 L.Ed.2d 443 (1983)); *see Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 631 n. 31, 100 S.Ct. 2844, 2858, 65 L.Ed.2d 1010 (1980). According to the administrative record before the court, federal defendants withdrew from the project because KDOT and Douglas County agreed not to use federal-aid highway funds for the eastern leg of the Trafficway (with the exception of the $108,000 spent on the mitigation site).

Federal defendants determined there was no major federal action because there would be no federal funding of the eastern leg. Such determination was in accord with 23 U.S.C. § 145, according to federal defendants, because "it is the State's decision to determine on which projects [the State] will use [its] limited Federal-aid highway funds." (AR Ex. 22.) Section 145, which is part of the Federal-Aid Highway Act, 23 U.S.C. § 101 *et seq.*, states: "The authorization of the appropriation of Federal funds or their availability for expenditure under this chapter shall in no way infringe on the sovereign rights of the States to determine which projects shall be federally financed. The provisions of this chapter provide for a federally assisted State program."

The Federal-Aid Highway Act provides "financial aid for approved state highway construction projects." *Miller v. United States*, 710 F.2d 656, 659 (10th Cir.1983). "The states own, construct, and maintain the highways which form the federal-aid highways within their borders. The statutory and regulatory criteria for federal-aid highway funding is an elaborate, intricate scheme." *Save Barton Creek Ass'n v. Federal Highway Admin.*, 950 F.2d 1129, 1134 n. 6 (5th Cir.1992). Based upon these criteria, the FHWA apportions the authorized money in the form of certificates among the states. Mike Mills, *Highway Bill Debates Becomes War Between the States*, Cong.Q. 1487, 1487-88 (June 8, 1991). A state seeking federal-aid highway funds must submit proposed projects for approval. *Miller*, 710 F.2d at 659-60. The FHWA is responsible for administering the federal-aid highway program, but "does not plan, design or locate highways." *No East-West*

Highway Comm., Inc. v. Whitaker, 403 F.Supp. 260, 273-74 (D.N.H.1975).

On April 2, 1987, Congress allocated funds for the Trafficway as a demonstration and priority highway project

> in Douglas County, Kansas, to demonstrate methods of reducing traffic congestion and facilitating the usage by motorists on the Interstate System of recreational facilities by construction of a north-south limited access trafficway of approximately 4 miles in length which will connect an east-west interstate route to a reservoir and a university research park.

Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), Pub.L. No. 100-17, § 149(a)(72), 1987 U.S.C.C.A.N. (101 Stat.) 132, 192. Congress appropriated a total of $7.2 million for the Trafficway. *Id.* § 149(b)(72), § 149(d). On December 22, 1987, Congress amended section 149(a)(72) to expand the road to

> approximately 14 miles in length which, at its western terminus, will provide access from an east-west Interstate highway route to a reservoir and a university research park, will proceed easterly around the southern portion of the City of Lawrence and, at its eastern terminus, will provide access to a business park and a limited access east-west State highway.

Department of Transportation and Related Agencies Appropriations Act of 1988, Pub.L. No. 100-202, § 345, 1987 U.S.C.C.A.N. (101 Stat.) 1329, 1329-358, 1329-387 to 1329-388. On December 18, 1991, as part of the rural

access projects, Congress appropriated an additional $3.3 million for the years 1992 through 1997 for a "Lawrence Circumferential Roadway." Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub.L. No. 102-240, § 1106(a)(2) ¶ 102, 1991 U.S.C.C.A.N. (105 Stat.) 1914, 2041.

Plaintiffs' key argument is that the Trafficway, a congressionally mandated highway demonstration project, cannot be defederalized, and that federal defendants' reliance upon 23 U.S.C. § 145 to discontinue the SEIS process is contrary to established law. Plaintiffs distinguish between demonstration projects and "normal" federal-aid highway projects, which plaintiffs liken to block grants: In the latter scenario, the state prioritizes the projects to submit to the FHWA for approval, and the allotted apportionment is not designated for any particular project. In contrast, demonstration projects are specific highway projects that Congress has selected and are not within the discretion of state highway departments. *See Where the Money Goes*, Cong.Q. 127, 128 (Dec. 7, 1991) ("[S]tate transportation officials often dislike [demonstration] projects because they bypass the traditional highway funding method of lump-sum grants, which let states decide how to spend the money. . . . Members of Congress defend the spending, saying they often know local road needs better than state transportation officials."); Mike Mills, *Demonstration Projects Survive in House Transportation Bill*, Cong.Q.2066, 2066 (July 27, 1991) ("Lawmakers increasingly use [demonstration projects] to steer federal dollars toward specific local road projects, bypassing the traditional formula funding process.").

Plaintiffs contend that because Congress authorized demonstration funds for the entire fourteen miles of the Trafficway, the entire Trafficway is major federal action regardless of how and where the federal funds have been spent. Plaintiffs claim that state and local officials cannot spend the federal demonstration funds in a different manner or on a different project than Congress authorized. *See* Mike Mills, *House Travels Favorite Road to Funding Local Highways*, Cong. Q. 1884, 1884 (July 13, 1991) (demonstration projects "bypass funding projects preferred by state planners and often leave local governments with no choice but to scrape together matching funds to build the projects"). Plaintiffs assert that federal defendants maintain control over the project by virtue of the Trafficway being a demonstration project. Finally, plaintiffs suggest the eastern leg of the Trafficway may be defederalized only if all federal funds expended on the entire project are reimbursed to the federal government. *See Ely v. Velde*, 497 F.2d 252, 257 (4th Cir.1974); *Hall County Historical Soc'y v. Georgia Dep't of Transp.*, 447 F.Supp. 741, 752 (N.D.Ga.1978).

In response, federal defendants assert that there is no major federal action because no federal funds have been requested or approved for constructing the eastern leg of the Trafficway and the Trafficway has been segmented into independent projects.

Federal defendants dispute that demonstration projects such as the Trafficway are not subject to the state sovereignty provisions of 23 U.S.C. § 145. Citing STURAA § 149(i) and ISTEA § 1106(a)(7), federal defendants argue that Congress did not intend for these acts to preempt the Federal-Aid Highway Act, including 23 U.S.C. § 145, or

its implementing regulations allowing segmentation, including 23 C.F.R. § 771.111(f). Under both STURAA and ISTEA, Congress specified that

> [f]unds authorized by this section shall be available for obligation in the same manner as if such funds were apportioned under chapter 1 of title 23, United States Code, except that the Federal share of the cost of any project under this section shall be determined in accordance with this section and such funds shall remain available until expended. Funds authorized by subsections (b) and (c) shall not be subject to any obligation limitation.

STURAA § 149(i); *accord* ISTEA § 1106(a)(7) (virtually identical language).

Federal defendants also argue that there is nothing in STURAA § 149 clearly stating that by accepting demonstration funds, the state is prohibited from segmenting the Trafficway for expenditure and NEPA purposes. *See Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 24, 101 S.Ct. 1531, 1543, 67 L.Ed.2d 694 (1981) ("Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds.")

Finally, to the extent STURAA and ISTEA are ambiguous concerning either the applicability of 23 U.S.C. § 145 or the appropriateness of imposing conditions on federal funds to states, federal defendants assert that the court must defer to federal defendants' statutory interpretation. *See, e.g., Smiley v. Citibank (S.D.)*, 517 U.S. 735, ___, 116 S.Ct. 1730, 1733, 135 L.Ed.2d 25 (1996) ("It is our practice to defer to the reasonable judgments of agencies

with regard to the meaning of ambiguous terms in statutes that they are charged with administering.").

The administrative record does not support federal defendants' emphasis on segmentation as a basis for finding no major federal action. The Trafficway was divided into four segments in 1994 to facilitate construction phasing and available funding limits. Defendants did not discuss making the eastern leg a non-federal project (i.e., defederalizing) until approximately two years after segmentation occurred. The court finds the segmentation argument to be "[a]fter-the fact rationalization," upon which the court cannot rely. *Olenhouse*, 42 F.3d at 1575 (citing *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 50, 103 S.Ct. at 2870).

Neither party cites any case law discussing demonstration highway projects in the NEPA context, and the court has found none. The court, therefore, bases its decision on the unambiguous statutes at issue here. "If a statute is clear and unambiguous, the court must interpret the statute to effect the unambiguous intent of Congress, regardless of the interpretation given to the statute by an administrative agency with responsibility for enforcement." *Mt. Emmons Mining Co. v. Babbitt*, 117 F.3d 1167, 1170 (10th Cir.1997). In such a scenario, the court's inquiry ends and the plain meaning of the language is conclusive except in the rare case not at issue here. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241-42, 109 S.Ct. 1026, 1030-31, 103 L.Ed.2d 290 (1989) *United States v. Brown*, 333 U.S. 18, 27, 68 S.Ct. 376, 381, 92 L.Ed. 442 (1948).

The language of STURAA § 149(i) and ISTEA § 1105(a)(7) communicates Congress' clear intent that demonstration projects such as the Trafficway be treated differently than other federal-aid highway projects.[8] These provisions dictate that authorized demonstration funds shall be available in the same manner as authorized funds under the Federal-Aid Highway Act. STURAA § 149(i) and ISTEA § 1105(a)(7) instruct how the funds will be administered; they do not invoke the state sovereignty provision of 23 U.S.C. § 145. To find to the contrary would eliminate demonstration projects for all intents and purposes. Although demonstration projects are waning in popularity, *see* 143 Cong. Rec. H3358-01, H3370, § 338, Sense of the Senate on Highway Demonstration

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[8] President Reagan vetoed STURAA, voicing his disapproval of "pork barrel spending" in the form of add-on funding for 152 highway special interest projects. . . . The total cost to complete these highway projects is estimated to be $5.5 billion, and they have not even been selected through the established Federal-aid highway program mechanism that relies on the expertise of State and local officials. In fact, there is virtually no hearing record and related analyses regarding the merits of these projects. The States, not the Congress should determine their highway program needs.

Reagan Veto Stalls Highway Bill: A Text, Cong.Q. 607, 607 (Apr. 4, 1987). The Senate overrode the presidential veto. Paul Starobin, *Highway Bill Veto Overridden After Close Call in the Senate*, Cong.Q. 604, 604-06 (Apr. 4, 1987). President Bush signed ISTEA into law, despite his dissatisfaction with the funding of demonstration projects, which, as one commentator observed, preempt "some state and local government authority over project selection by adding 538 demonstration projects not subject to the review of federal, state, or local governmental officials." Robert Jay Dilger, *ISTEA: A New Direction for Transportation Policy*, 22 Publius 67, 77 (1992).

Projects (June 4, 1997), the virtue of demonstration projects is not before the court.

Pursuant to STURAA and ISTEA, Congress appropriated over $10 million in demonstration funds for a fourteen-mile Trafficway, not a four-mile nor a ten-mile highway. The conditions attached to the grant of federal funds to the state are unequivocal. The federal funds are to be expended on the described project. The court finds that the entire Trafficway is major federal action over which federal defendants have " 'the ability to influence or control the outcome in material respects.' " *Village of Los Ranchos de Albuquerque*, 906 F.2d at 1482 (quoting *Sierra Club*, 848 F.2d at 1089). Accordingly, the court finds that federal defendants' actions at issue were not in accordance with the law.

Because the entire Trafficway, including the unconstructed eastern leg, is major federal action, the court has subject matter jurisdiction over the case. Before examining plaintiffs' request for injunctive relief, the court briefly will address plaintiffs' standing to bring the case.

II. Standing

Standing is a threshold issue and jurisdictional requisite for bringing a case in federal court, *United States v. McVeigh*, 106 F.3d 325, 334 (10th Cir.1997), a "bedrock requirement," *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982). "To meet the standing requirements of Article III, '[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by

the requested relief.' " *Raines v. Byrd*, 521 U.S. 811, ___, 117 S.Ct. 2312, 2317, 138 L.Ed.2d 849 (1997) (quoting *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324-25, 82 L.Ed.2d 556 (1984)). In addition to constitutional standing requirements, plaintiffs must establish that final agency action caused them to suffer "an injury in fact falling within the 'zone of interests' " that NEPA protects. *Committee to Save the Rio Hondo*, 102 F.3d at 448 (citations omitted).

The court has examined the complaint[9] and is persuaded that plaintiffs have alleged a concrete and particularized injury capable of being resolved through the judicial process. The court also finds that plaintiffs have alleged injury falling within the NEPA-protected "zone of interests." *See Raines*, 521 U.S. at ___-___, 117 S.Ct. at 2317-18; *Committee to Save the Rio Hondo*, 102 F.3d at 447-52.

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[9] According to the allegations in the complaint, the individual plaintiffs utilize the southern portion of the Haskell campus, which is adjacent to the proposed 31st Street alignment, for spiritual practice and solitude, for recreational use, for aesthetic purposes, and/or for environmental studies. The membership of plaintiffs Wetlands Preservation Organization and Kansas University Environs utilizes the wetlands for spiritual, religious, educational, and environmental purposes. All plaintiffs allege that completion of the Trafficway as presently planned will create pollution, litter, traffic, noise, lights, and other effects, interfering with their use of the land.

III. Injunction

Having established subject matter jurisdiction and standing, the court will proceed to the merits of the case. Plaintiffs ask the court to convert the preliminary injunction into permanent injunctive relief. If this court should make its injunction permanent, it would last only as long as it takes federal defendants to complete the SEIS process, issue a final SEIS, and enter a new Record of Decision.

As evinced in the discussion concerning subject matter jurisdiction, plaintiffs have demonstrated that the Trafficway is major federal action and that defendants are violating NEPA by failing to complete the SEIS process for the unconstructed portion of the Trafficway. Plaintiffs have established a statutory violation.

The court, however, "is not mechanically obligated to grant an injunction for every violation of law." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313, 102 S.Ct. 1798, 1803, 72 L.Ed.2d 91 (1982). It is fundamental "that an injunction is an equitable remedy that does not issue as of course." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542, 107 S.Ct. 1396, 1402, 94 L.Ed.2d 542 (1987) (citing *Weinberger*, 456 U.S. at 311, 102 S.Ct. at 1802-03). Unless the statute in question, either expressly or by "necessary and inescapable inference," limits the court's equity jurisdiction, issuance of injunctive relief is within the court's discretion. *Weinberger*, 456 U.S. at 313, 102 S.Ct. at 1803-04. Courts have concluded that NEPA does not limit the court's equity jurisdiction. *See, e.g., Wilderness Soc'y v. Tyrrel*, 701 F.Supp. 1473, 1477 (E.D.Cal.1988), *rev'd on other grounds*,

918 F.2d 813 (9th Cir.1990); *Friends of the Earth v. Hall*, 693 F.Supp. 904, 948-49 (W.D.Wash.1988).

"In brief, the bases for injunctive relief are irreparable injury and inadequacy of legal remedies. In each case, a court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief."[10] *Amoco Prod. Co.*, 480 U.S. at 542, 107 S.Ct. at 1402 (citing *Weinberger*, 456 U.S. at 311-13, 102 S.Ct. at 1802-04). "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Id.* at 545, 107 S.Ct. at 1404. Additionally, courts must factor the public interest into the equitable equation. *Id.*

Plaintiffs contend that they have no adequate remedy at law and will suffer irreparable injury if, prior to completion of the Trafficway's eastern leg, full consideration of the environmental impact to their use of the adjacent lands does not occur. Plaintiffs emphasize the uniqueness of and the 100-year traditions associated with the land at issue.

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[10] The Supreme Court noted that "[t]he standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success." *Amoco Prod. Co.*, 480 U.S. at 546 n. 12, 107 S.Ct. at 1404 n. 12.

The court agrees that construction of the eastern portion of the Trafficway as presently planned will result in a permanent alteration to the environment. "An environmental injury usually is of an enduring or permanent nature, seldom remedied by money damages and generally considered irreparable." *Catron County Bd. of Comm'rs*, 75 F.3d at 1440 (citing *Amoco Prod. Co.*, 480 U.S. at 545, 107 S.Ct. at 1404).

Plaintiffs also maintain that the additional time required to finalize a substantially complete draft of the SEIS is minimal, considering that the Trafficway has been in the planning stage for over twenty years and in the environmental review stage for over nine years. Plaintiffs further allege that completion of the SEIS will not harm third parties because defendants have not yet purchased land east of U.S. 59.

Defendants argue that delays in construction run the potential for increased land and construction costs should the highway be built later. Plaintiffs dispute that such an argument outweighs their interests. *See Highland Coop. v. City of Lansing*, 492 F.Supp. 1372, 1382 (W.D.Mich.1980) ("While the delay in a construction project will almost invariably result in an increase in the eventual costs, those costs cannot be said to be a substantial harm."). Plaintiffs further claim that if a final SEIS recommends a different route for the eastern portion of the Trafficway, defendants will save money that would have been spent on roadway designs and land acquisitions for a "ghost highway."

Defendants also suggest that any delay will jeopardize the public safety because existing roads are unable to

accommodate the current level of traffic. Public safety is certainly a concern; however, defendants have not established that the danger of existing roadways is so imminent that it outweighs all other concerns.

Plaintiffs assert that it is not in the public interest to begin construction on one route when the impact statement regarding route selection is pending. *See Dickman*, 724 F.Supp. at 1348. Such action, according to plaintiffs, cannot not be in the public interest because such action violates NEPA public policy and implementing regulations. *See Park County Resource Council, Inc. v. United States Dep't of Agric.*, 817 F.2d 609, 620 (10th Cir.1987) ("NEPA . . . reflects an important public policy of this nation: the avoidance of precipitous federal decision making at the agency level which may fail to adequately consider the environmental ramifications of agency actions."), *overruled on other grounds, Village of Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir.1992); *Northern Crawfish Frog*, 858 F.Supp. at 1506 (" 'major Federal actions significantly affecting the quality of the human environment' must be preceded by an environmental impact statement") (internal quotations and citations omitted); 40 C.F.R. § 1506.1.

Defendants contend that an injunction harms the public interest because plaintiffs' true goal is derailment of the eastern portion of the Trafficway, an objective that puts public safety at risk. Defendants' contention is speculative. Plaintiffs' satisfaction or dissatisfaction with the yet-to-be selected route for the eastern leg of the Trafficway is not the issue before the court.

The court finds plaintiffs' arguments persuasive. Plaintiffs have demonstrated their entitlement to injunctive relief.

IT IS, THEREFORE, BY THE COURT ORDERED that all defendants are enjoined from taking any action and expending any funds on the eastern leg of the Trafficway prior to completion of the supplemental environmental impact statement process, issuance of a final supplemental environmental impact statement, and entry of a new Record of Decision.

The case is now closed.

IT IS SO ORDERED.

United States Court of Appeals,
Tenth Circuit.

Thomasine ROSS; Stanley Ross; Anjanette Bitsie; Pamina Yellowbird; Jason Daniels; and Wetlands Preservation Organization and Kansas University Environs, Kansas unincorporated associations, Plaintiffs-Appellees,

v.

FEDERAL HIGHWAY ADMINISTRATION; David Geiger, in his official capacity as Division Administrator, Federal Highway Administration; Mark Buhler, Tom Taul, Dean Nieder, in their official capacities as County Commissioners of Douglas County, Kansas; and E. Dean Carlson, in his official capacity as Kansas Secretary of Transportation, Defendants-Appellants.

Nos. 97-3240, 97-3278.

Nov. 17, 1998.

Bruce M. Plenk, (Robert V. Eye, of Irigonegaray & Associates, Topeka, Kansas, with him on the brief), Lawrence, Kansas, for Plaintiffs-Appellees.

Tamara N. Roundtree, (John A. Bryson, U.S. Department of Justice; and Diane K. Mobley, U.S. Department of Transportation, Federal Highway Administration, Office of the Chief Counsel, Washington, D.C. with her on the brief), U.S. Department of Justice, Washington, D.C., for Defendants-Appellants Federal Highway Commission and David Geiger.

Michael J. Davis, (Patricia A. Konopka, of Stinson, Mag & Fizzell, P.C., Kansas City, Missouri; and Michael B. Rees, Office of Chief Counsel, Kansas Department of Transportation, Topeka, Kansas, with him on the brief), of

Stinson, Mag & Fizzell, P.C., Kansas City, Missouri, for Defendants-Appellants Kansas Department of Transportation and Douglas County, Kansas.

Before BALDOCK, McKAY, and HENRY, Circuit Judges.

BALDOCK, Circuit Judge.

Defendants appeal the district court's grant of a permanent injunction enjoining further action on a segment of the South Lawrence trafficway in Douglas County, Kansas, pending the completion of a supplemental environmental impact statement (hereafter "SEIS") and entry of a new record of decision by the Federal Highway Administration (hereafter "FHWA"). Defendants argue that the district court erred in concluding (1) that the eastern segment of the trafficway, which runs along 31st Street in Lawrence, Kansas, was a "major federal action" subject to the requirements of the National Environmental Policy Act (hereafter "NEPA"); and (2) that § 145 of the Federal-Aid Highway Act (hereafter "FAHA") does not apply to demonstration projects. In the alternative, Defendants argue that if the project was properly deemed a major federal action, the district court erred in ordering an SEIS without allowing the agency to determine whether NEPA in fact required such action. Our jurisdiction arises under 28 U.S.C. § 1291. We affirm.

I.

The development of a southern bypass around Lawrence, Kansas has taken a long and winding path.

Although the idea for a southern bypass around Lawrence has been under consideration for more than thirty years, the FHWA became involved in the South Lawrence Trafficway project in 1986. At that time, local, state and federal officials began planning the trafficway as a jointly funded federal-aid highway project. Under the Federal-Aid Highway Act, states may seek reimbursement for a percentage of the costs incurred for highway projects. 23 U.S.C. § 101 et. seq. States seeking federal highway funds must submit to FHWA a list of proposed transportation projects. 23 U.S.C. § 105. Upon final approval of the project and compliance with applicable federal laws and regulations, including NEPA, FHWA reimburses the state for a portion of the project's cost. *See* 23 U.S.C. § 120; 23 C.F.R. § 1.36; 42 U.S.C. § 4332(2)(C). Thus, in order to be eligible for federal funding, the state needed to prepare an environmental impact statement (hereafter "EIS").

On June 23, 1986, the FHWA published in the Federal Register a Notice of Intent to Prepare an EIS for the trafficway. The notice stated that the project "runs east-west near 31st Street in South Lawrence from K-10 to the Clinton Dam and north-south from Clinton Dam to the Kansas Turnpike." After public comment, FHWA approved and released to the public a final EIS for the entire South Lawrence trafficway. The next day, the FHWA issued a Record of Decision, selecting a route for the trafficway, which included the eastern leg along 31st Street. In April 1993, the United States Army Corps of Engineers issued a permit pursuant to the Clean Water Act for the 31st Street route, allowing state and county authorities to discharge dredge or fill material into wetlands. *See* 33 U.S.C. § 1344(a).

Congress appropriated $7.2 million in federal funding for the trafficway on April 2, 1987, and designated the trafficway as a demonstration project.[1] Surface Transportation and Uniform Relocation Assistance Act of 1987 ("STURRA"), Pub.L. No. 100-17, § 149(a)(72), 101 Stat. 132, 192 (1987). On December 22, 1987, Congress amended § 149(a)(72) of STURRA to expand the trafficway to:

> approximately 14 miles in length, which, at its western terminus, will provide access from an east-west Interstate highway [I-70] route to a reservoir and a university research park, will proceed easterly around the southern portion of the City of Lawrence and, at its eastern terminus, will provide access to a business park and a limited access east-west State highway [Kansas Highway 10].

Department of Transportation and Related Agencies Appropriations Act of 1988, Pub.L. No. 100-202, § 345, 101 Stat. 1329 (1987). In 1991, Congress appropriated an additional $3.3 million for the years 1992 through 1997 for the trafficway. Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub.L. No. 102-240, § 1106(a)(2), 105 Stat.1914, 2041 (1991). Of these funds, $108,000 have been expended on the eastern leg of the trafficway for wetlands mitigation.[2] The remainder of the

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[1] Demonstration projects, specially earmarked by Congress, are designed to demonstrate novel road-building techniques. *Cf.* Mike Mills, *House Travels Favorite Road to Funding Local Projects*, 49 Cong.Q. 1884, 1885 (July 13, 1991).

[2] Mitigation of 11.89 acres of wetlands that the 31st Street alignment would impact was completed with a net gain of 3.41 acres of wetlands.

$10.4 million in federal funds authorized for the South Lawrence trafficway have been spent on the western portions.

In July and October 1993, representatives of Haskell Indian Nation University expressed concerns that the 31st Street route adjacent to the campus would impact its property, cultural traditions, and spiritual sites. When the Haskell Board of Regents passed a resolution opposing construction of the trafficway along 31st Street, Douglas County, the Kansas Department of Transportation (hereafter "KDOT"), and FHWA suspended work along the 31st Street portion of the trafficway. FHWA, KDOT and Douglas County later determined that because the original EIS did not consider the University's concerns, an SEIS was necessary. Accordingly, on October 17, 1994, FHWA published a Notice of Intent to Prepare an SEIS.

In April 1994, after Haskell University raised its concerns about the 31st Street leg of the project, KDOT requested that FHWA allow the trafficway to be segmented in order to facilitate construction and funding limits.[3] In May 1994, FHWA approved KDOT's request to

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[3] Generally, segmentation of highway projects is improper for the purpose of preparing environmental documentation. *See Village of Los Ranchos de Albuquerque v. Barnhart*, 906 F.2d 1477, 1483 (10th Cir.1990). A project may be properly segmented, however, if the segments (1) have logical termini; (2) have substantial independent utility; (3) do not foreclose the opportunity to consider alternatives; and (4) do not irretrievably commit federal funds for closely related projects. *Id.* After determining that the South Lawrence trafficway met these requirements, FHWA approved segmentation. The parties do not challenge the segmentation of the trafficway. Therefore,

segment the trafficway, with three segments on the western leg (Kansas Turnpike south to U.S. 40, U.S. 40 south to Clinton Parkway, and Clinton Parkway south and west to U.S. 59) and one segment on the eastern leg (east of U.S. 59 to 31st Street east to K-10). The three segments on the western leg have since been completed and are in use.

On October 2, 1995, FHWA, KDOT and Douglas County released a draft SEIS addressing the 31st Street portion of the trafficway for public comment. On November 8, 1995, Douglas County, FHWA and KDOT held a public hearing on the draft SEIS. After the hearing, the SEIS process stalled because FHWA, KDOT and Douglas County were unable to reach an agreement on the alignment of the eastern leg. On December 9, 1996, Douglas County sent a letter to FHWA, notifying the agency that the county intended to proceed with the original 31st Street route for the eastern leg of the trafficway, and asking FHWA to "give their position in writing and recommend a method to conclude the SEIS process." The letter expressed the county's frustration with the SEIS process stating that "[t]he Douglas County Board of County Commissioners is frankly disappointed that the efforts of the last three years have not produced an acceptable alternative to 31st Street. . . . The SEIS process is deadlocked. FHWA has yet to take a stand in writing on any of the three alignments. . . . We await your advice and position but must clearly proceed to complete the project the County voters approved over six years ago."

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we do not have before us the issue of whether FHWA properly approved segmentation in this case.

Two months later, in February 1997, KDOT, in hopes of completing the project, forwarded to FHWA an agreement between KDOT and Douglas County to construct the eastern leg of the trafficway as a nonfederal project, without the use of federal-aid highway funds. KDOT stated that the agreement should "resolve the question of any further involvement by the FHWA [in this project]." On February 21, 1997, FHWA responded by letter, acquiescing to KDOT's decision to treat the eastern portion of the trafficway as a local project. In the letter to Douglas County, Defendant David R. Geiger, FHWA division administrator, stated that the FHWA "will no longer be the lead Federal agency for this project. In accordance with 23 U.S.C. § 145, it is the State's decision on which highway projects they will use their limited Federal-aid highway funds. . . . " On March 6, 1997, FHWA published a notice in the Federal Register withdrawing the Notice of Intent to complete an SEIS.

On March 12, 1997, Plaintiffs filed their complaint seeking to enjoin further action on the project. On March 15, 1997, the district court granted a preliminary injunction. Following a hearing on May 2, 1997, the district court issued a permanent injunction preventing FHWA, KDOT and Douglas County from taking further action on the eastern leg of the trafficway pending completion of the SEIS process, issuance of a final SEIS and entry of a new Record of Decision. Applying the arbitrary and capricious standard of review set forth in § 706(2)(A) of the Administrative Procedure Act (hereafter "APA"), the district court concluded that Defendants violated NEPA by not completing the SEIS.

II.

A.

Plaintiffs argue that FHWA improperly discontinued the SEIS process and withdrew from the eastern leg of the South Lawrence trafficway. We review an agency decision regarding the need for an SEIS under the arbitrary and capricious standard of the APA, 5 U.S.C. § 706(2)(A). *See Holy Cross Wilderness Fund v. Madigan*, 960 F.2d 1515, 1524 (10th Cir.1992). The scope of review under this standard is narrow, *id.*, and we may not substitute our judgment for that of the agency. *Hoyl v. Babbitt*, 129 F.3d 1377, 1383 (10th Cir.1997).

Under the APA, we may set aside the agency's decision only if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. 5 U.S.C. § 706(2)(A). We must determine whether the agency considered all relevant factors and whether there has been a clear error of judgment. *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir.1994). Agency action will be set aside if:

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). Moreover, if agency action was "unlawfully withheld or unreasonably delayed," we must compel the agency to

take appropriate action. 5 U.S.C. § 706(1); *see also Mt. Emmons Mining Co. v. Babbitt*, 117 F.3d 1167, 1170 (10th Cir.1997). In conducting our review of the agency decision, we accord no deference to the district court's decision. *Id.*

B.

Congress enacted NEPA to promote environmental quality. *See* 42 U.S.C. § 4331(a)-(c). As a means of doing so, NEPA establishes procedures agencies must follow, such as preparing an EIS or SEIS. *Committee to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 448 (10th Cir.1996). These procedures ensure that the agency will take a "hard look" at the effect of its actions. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21, 96 S.Ct. 2718, 49 L.Ed.2d 576 (1976). NEPA does not mandate a particular outcome, only a specific process that the agency must follow. *Rio Hondo*, 102 F.3d at 448. Compliance with NEPA is required, however, only if the federal government's involvement in a project constitutes "major federal action." *Los Ranchos*, 906 F.2d at 1480; 42 U.S.C. § 4332(2)(C). Thus, in order to determine whether FHWA acted arbitrarily and capriciously by discontinuing the SEIS process and withdrawing from the completion of the trafficway, we must first decide whether the trafficway constitutes a major federal action.

We have defined "major federal action" as "actions by the federal government . . . and nonfederal actions 'with effects that may be major and which are potentially subject to Federal control and responsibility.' " *Los Ranchos*, 906 F.2d at 1482 (quoting *Sierra Club v. Hodel*, 848 F.2d 1068, 1089 (10th Cir.1988)). In effect, "major federal

action" means that the federal government has "actual power" to control the project. *Id.*

Defendants argue that the district court erred in concluding that the entire trafficway, including the eastern leg, remained a "major federal action" after the state decided not to seek any additional federal funds to construct the eastern leg of the trafficway. Defendants ask us to consider only the eastern segment of the trafficway in determining whether a "major federal action" exists. Defendants argue that because the state will not use federal funds to complete the eastern segment, the segment is not a "major federal action" under *Los Ranchos* and therefore NEPA does not apply.

Defendants' argument overemphasizes the segmentation of the trafficway. Defendants assume that once a federal-aid highway project is segmented it may be defederalized, regardless of how far the project has advanced. Segmentation does not, however, necessarily convert a trafficway into federal and nonfederal segments. In this case, Kansas' argument for "defederalization" of the eastern leg is based, not on segmentation, but instead on the state's withdrawal, more than two years after segmentation, from federal funding for the eastern segment. Likewise, FHWA's articulated reason for withdrawing from the project after state and county officials decided not to use federal funds, was Kansas' right under 23 U.S.C. § 145[4] to determine which highway projects will

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[4] Title 23 U.S.C. § 145 provides that "[t]he authorization of the appropriation of Federal funds or their availability for expenditure under this chapter shall in no way infringe on the sovereign rights of the States to determine which projects shall be federally financed."

be federally financed. Therefore, the relevant inquiry on appeal is whether § 145 authorized state and local officials, with FHWA approval, to "defederalize" a segment of a "major federal action" by foregoing federal funding in order to avoid compliance with NEPA. On the unique facts of this case, the answer is no.

The South Lawrence Trafficway envisioned and planned by FHWA, KDOT and Douglas County was clearly a "major federal action." Congress appropriated approximately $10.4 million for the entire fourteen-mile trafficway. *See Los Ranchos*, 906 F.2d at 1480 (noting that courts have found highways major federal actions where federal funds have been approved or are immediately sought). In this case, the manner in which the project was funded strengthens the federal government's "actual power to control" this project. *See id.* at 1482. In the appropriations bill, Congress specifically designated the trafficway as a demonstration project. *See* STURRA, Pub.L. No. 100-17, § 149(a)(72), 101 Stat. 132, 192 (1987). Funding for demonstration projects differs from normal federal-aid highway projects in that the demonstration funds may only be spent on the specified project. *See* Mike Mills, *Where the Money Goes*, 49 Cong.Q. 127, 128 (Dec. 7, 1991). Indeed, states prefer "normal" highway funding which allows them to prioritize projects, instead of demonstration funding which specifies the particular project on which the money must be spent. *Id.* Congress' decision to select the trafficway as a demonstration project shows a high degree of federal involvement in this case. In addition, KDOT and Douglas County sought federal approval at each stage of the project and spent more than $10 million in federal funds on the project,

including $108,000 on the eastern segment. Therefore, the district court did not err in concluding that the entire trafficway is a "major federal action" within the meaning of 42 U.S.C. § 4332(2)(C).

The question now becomes whether Kansas and Douglas County can withdraw a segment of the trafficway from federal funding and, as a result, discontinue the segment's status as a "major federal action," circumventing the SEIS process already begun. This question has not been directly addressed by our circuit. The Fifth and Seventh circuits, however, have concluded that states may not avoid NEPA's requirements by withdrawing a segment of a project from federal funding. *San Antonio Conservation Society v. Texas Highway Dept.*, 446 F.2d 1013, 1027 (1971) (state cannot circumvent federal laws by constructing segment of federal highway project with state funding); *Scottsdale Mall v. State of Indiana*, 549 F.2d 484, 489 (7th Cir.1977) (withdrawal of federal funding from a segment of a "major federal action" does not relieve state of NEPA compliance).

The facts of this case are very similar to *Scottsdale Mall*. In that case, the Indiana State Highway Commission (hereafter "ISHC") withdrew a highway project from federal-aid highway funding and sought to proceed solely with state funds in the final stages of the project. *Id.* at 485. By doing so, the state sought to avoid NEPA compliance. *Id.* The court determined that withdrawal from federal funding in the project's final stages did not relieve the state of its obligation to comply with federal environmental laws. *Id.* at 489.

The project at issue in *Scottsdale Mall* was a 28-mile bypass around the South Bend-Elkhart area in Indiana. *Id.* at 486. The by-pass, under consideration for twenty years, was planned as a federal project in four segments. *Id.* At the time of the lawsuit, the state of Indiana had completed one segment, spending $6.7 million in federal funds. *Id.* One of the uncompleted segments was set to bisect the plaintiff's property, a shopping mall in South Bend, Indiana. *Id.* The plaintiff brought suit, arguing that the state had not complied with NEPA. *Id.* at 485. The state then decided to build the segment without further federal assistance. *Id.* at 486. This, the state apparently argued, relieved it of its duty to comply with NEPA. Looking to the history of federal-state involvement in the project, the court concluded that the highway project "was so imbued" with a "federal character" that the state had to comply with the federal environmental statutes even if it withdrew the project from federal funding participation. *Id.* at 489. Simply put, "there is a point in the on-going federal-state relationship under Federal-Aid Highway Act programming at which the requirements of NEPA must be met." *Id.*

We find the analysis of *Scottsdale Mall* persuasive. At the advanced stage of the trafficway project, it was simply too late for the state of Kansas to convert the eastern segment into a local project. Since 1986, local, state and federal authorities scheduled, programmed and worked on the trafficway as a joint federal-state project. The federal nature of the trafficway was so pervasive that the Kansas authorities could not rid the project of federal involvement simply by withdrawing the last segment of

the project from federal funding. *See Scottsdale Mall*, 549 F.2d at 488.

Defendants assert that § 145 gives the state the authority to convert the eastern segment into a local project. *See supra* n. 3. To be sure, § 145 guarantees to states the right to select which of many transportation projects shall receive FAHA assistance. Section 145 does not, however, authorize states to circumvent compliance with NEPA by persuading FHWA to withdraw from participation in a portion of a selected project. *See Scottsdale Mall*, 549 F.2d at 488; *see also Los Ranchos*, 906 F.2d at 1482 (noting that there was no showing that the local defendants were trying to evade federal environmental requirements). *See Scottsdale Mall*, 549 F.2d at 488. In other words, once the federal government is pervasively involved in every stage of a federal-aid highway project, § 145 does not allow states to withdraw a portion of the project from federal funding consideration with the resulting effect of avoiding compliance with federal environmental laws. Therefore, the decision by KDOT and Douglas County not to use additional federal funds on the eastern leg of the project did not change the fundamental nature of this project as a "major federal action" or relieve the state of its obligation to comply with NEPA. We do not, however, define the precise point at which a federal project becomes immutably federal for purposes of NEPA compliance. We conclude only that the South Lawrence Trafficway was so imbued with a federal character that the eastern segment of the project could not be "defederalized."

Defendants rely heavily on *Los Ranchos*, 906 F.2d 1477 (10th Cir.1990), to argue that the eastern segment is not a

major federal action. We find nothing in *Los Ranchos*, however, which supports Defendants' decision to "defederalize" the eastern segment of the South Lawrence trafficway. *Los Ranchos* is distinguishable from the present case because of the nature and degree of federal involvement with the transportation project at issue in that case.

In *Los Ranchos*, FHWA had only preliminary involvement in the project. FHWA's involvement was limited to assistance with the preparation of the EIS and approval of the final EIS. As of the date of the approval of the EIS, "federal involvement in the . . . [project] came to an end." *Los Ranchos*, 906 F.2d at 1479. Importantly, the state did not request or receive federal funding for the construction of the project. *Id.* The only federal funds expended were $59,000 incurred in connection with the preparation of the EIS. Although the project remained eligible for federal funding, we concluded that "eligibility in itself is not sufficient to establish a major federal action requiring the FHWA to comply with the requirements of NEPA." *Id.* at 1481. Our case differs significantly from *Los Ranchos*. First, it differs because federal funding was sought and appropriated[5] for the trafficway, including the 31st Street segment. Second, it is distinguishable because FHWA

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[5] Defendants make much of the fact that all but $108,000 of the $10.4 million appropriated for construction of the trafficway was spent on the three western segments. We do not find this determinative. To do so would mean that a state could request and accept federal funds for a highway project, spend all the allocated funds on only a portion of the project and then avoid NEPA compliance for the remainder of the project, arguing that no federal funds had been expended.

participation continued long after the initial EIS was completed and approved, unlike *Los Ranchos* where federal involvement ceased at the preliminary planning stages of the project. Thus, we do not find Defendants' reliance on *Los Ranchos* persuasive.

C.

Although we agree with the district court's conclusion that § 145 does not permit the state to "defederalize" the eastern segment of the trafficway, we do not adopt the district court's analysis. *See Gowan v. U.S. Dept. of Air Force*, 148 F.3d 1182, 1189 (10th Cir.1998) (we may affirm the district court on any ground supported by the record). The district court based its decision on the trafficway's status as a demonstration project, distinguishing between demonstration projects, which are expressly selected and funded by Congress, and "normal" federal-aid highway projects, which the states prioritize and for which appropriations are not specifically designated. The district court concluded that the state sovereignty provision of § 145 of the FAHA does not apply to demonstration projects. If it did, the district court opined, § 145 would "eliminate demonstration projects for all intents and purposes." 972 F.Supp. at 561. The court was concerned that, in effect, the application of § 145 to demonstration projects would allow states to rewrite appropriations bills. Thus, the district court concluded that because "Congress appropriated over $10 million in demonstration funds for a fourteen-mile Trafficway, not a four-mile nor a ten-mile highway . . . [t]he conditions attached to the grant of federal funds to the state [for the trafficway] are unequivocal." *Id.*

Although well-reasoned, the district court's analysis did not have the benefit of a recent amendment to § 145,[6] which Defendants contend directly contradicts the district court's analysis. Based upon the amendment's plain language, Congress apparently intended for demonstration projects to be treated no differently than any other federal-aid highway projects for purposes of the state sovereignty provision of § 145. We need not decide the effect of this amendment on this case, however, because § 145, either in its original form or as amended, does not authorize Kansas to circumvent federal environmental laws by withdrawing a segment of the trafficway from federal funding at this late stage in the project.

D.

In the alternative, Defendants argue that the district court erred by granting injunctive relief requiring FHWA

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[6] On June 9, 1998, President Clinton signed into law the Transportation Equity Act for the Twenty First Century, Pub.L. No. 105-178, § 1601(b). The Act amends § 145 by (1) creating subsection (a) consisting of the original provision of § 145 and entitled "Protection of State Sovereignty"; and (2) adding subsection (b) which provides as follows:

> Purpose of Projects – The projects described in . . . section 149(a) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 [STURRA] are intended to establish eligibility for Federal-aid highway funds made available for such projects . . . and are not intended to define the scope or limits of Federal action in a manner inconsistent with subsection (a).

Section 149(a) of STURRA created the demonstration project at issue in this case.

to issue a final SEIS without first allowing FHWA to determine whether an SEIS was needed to complete the project. We review the district court's grant of an injunction for abuse of discretion. *Law v. National Collegiate Athletic Ass'n,* 134 F.3d 1010, 1016 (10th Cir.1998).

The district court's injunction prevents Defendants from "taking any action and expending any funds on the eastern leg of the Trafficway prior to completion of the supplemental environmental impact statement process, issuance of a final supplemental environmental impact statement, and entry of a new Record of Decision." 972 F.Supp. at 563. Defendants argue that the injunction "impermissibly usurped the agency's discretion" by ordering the SEIS. We disagree. Courts have routinely recognized the appropriateness of injunctive relief requiring the preparation or completion of an EIS or SEIS. *See Sierra Club v. Hodel,* 848 F.2d 1068, 1096-97 (10th Cir.1988) (enjoining construction pending completion of NEPA studies) (*overruled on other grounds by Village of Los Ranchos De Albuquerque v. Marsh,* 956 F.2d 970 (10th Cir.1992)); *Wisconsin v. Weinberger,* 745 F.2d 412, 428 (7th Cir.1984) ("An order requiring the preparation of an SEIS, of course, may always be appropriate to vindicate the purposes of NEPA"); *Environmental Defense Fund v. Tennessee Valley Auth.,* 468 F.2d 1164, 1168 (6th Cir.1972) (requiring completion of EIS prior to construction of project).

The district court in this case did not "usurp" FHWA's discretion by ordering FHWA to complete the SEIS process. The injunction merely remedies the improper agency conduct in this case, that is, FHWA's discontinuance of the SEIS process and withdrawal as

lead agency from the trafficway. Therefore, the district court did not abuse its discretion in ordering the relief.

III.

We sympathize with the state and county's desire to complete the last segment of the South Lawrence Trafficway, and indeed they thought they had found a way to complete it. However, as the Fifth Circuit explained in *San Antonio*, "[n]o one forced the State to seek federal funding, to accept federal participation, or to commence construction of a federal aid highway. The State, by entering into this venture, voluntarily submitted itself to federal law." 446 F.2d at 1028. The state of Kansas and Douglas County chose to develop this trafficway in conjunction with the federal government as a federal-aid highway project and proceeded in that manner for more than ten years before attempting to "defederalize" a portion of the project. Although states may, in appropriate circumstances, choose to construct a highway project as a purely local undertaking and, as a result, avoid federal environmental laws, this is not that case. Kansas and Douglas County's attempt to withdraw a portion of the trafficway from federal funding, after the project hit an environmental road block, does not relieve FHWA of its statutory obligation to comply with NEPA. Therefore, FHWA abused its discretion by discontinuing the SEIS process and withdrawing from the eastern leg of the trafficway.

For these reasons, the decision of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

THOMASINE ROSS; STANLEY ROSS; ANJANETTE BITSIE; PAMINA YELLOWBIRD; JASON DANIELS; WETLANDS PRESERVATION ORGANIZATION, KANSAS UNIVERSITY ENVIRONS, Kansas unincorporated associations, Plaintiffs-Appellants, v. FEDERAL HIGHWAY ADMINISTRATION; DAVID GEIGER, in his official capacity as division administrator; MARK BUHLER; TOM TAUL; DEAN NEIDER, in their official capacities as Douglas County, Kansas, Commissioners; E. DEAN CARLSON, in his official capacity as Kansas Secretary of Transportation, Defendants-Appellees.	)	No. 99-3269

ORDER

Filed March 21, 2001

Before **KELLY, ANDERSON,** and **HENRY,** Circuit Judges.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ Danielle Aguirre
Deputy Clerk